CLERK'S COPY. 2624

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 283.

JOHN B. WIGHT, JOHN W. ROSS, AND LANSING H. BEACH, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

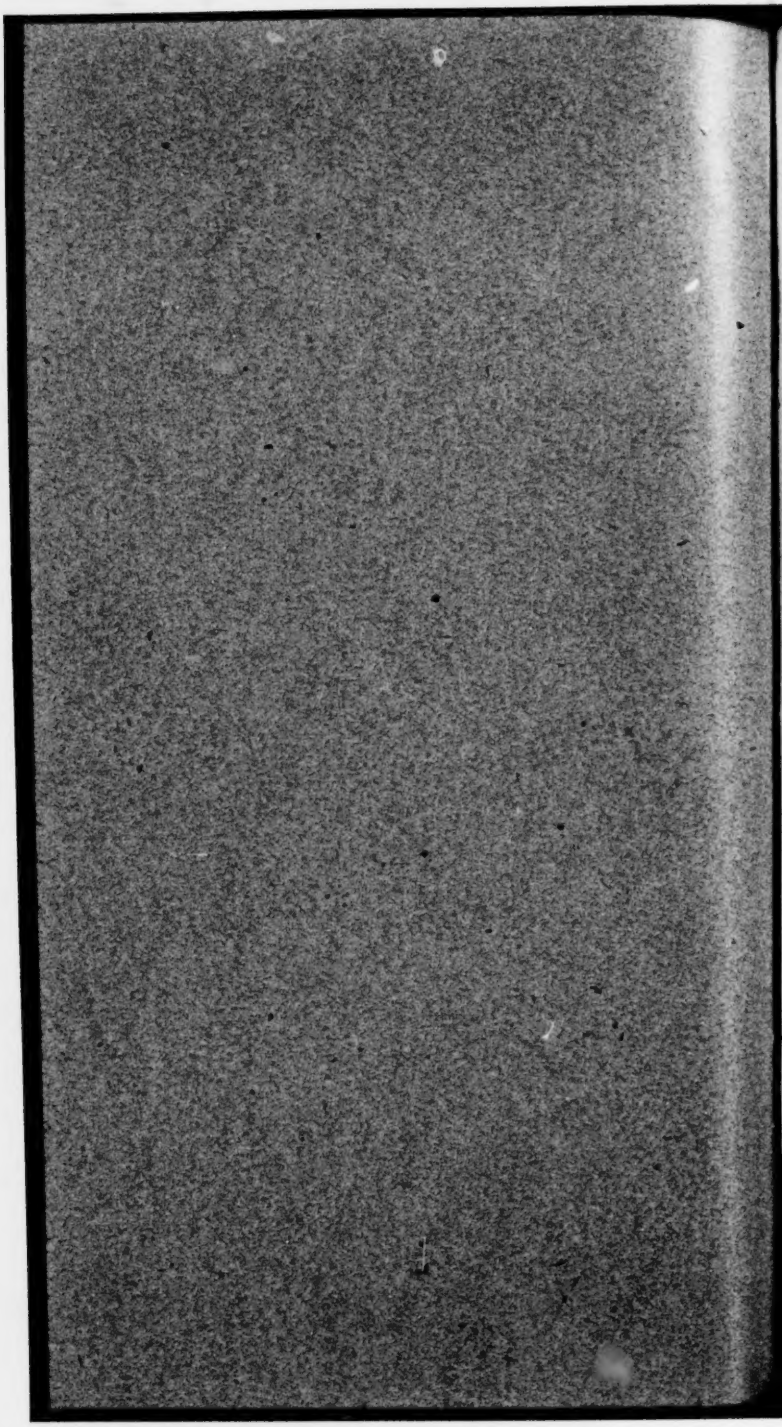
vs.

CHARLES H. DAVIDSON AND A. A. WILSON AND JOHN B. LARNER, TRUSTEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 15, 1900.

(17,765.)



26245

(17,765.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 283.

JOHN B. WIGHT, JOHN W. ROSS, AND LANSING H. BEACH, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

CHARLES H. DAVIDSON AND A. A. WILSON AND JOHN B. LARNER, TRUSTEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from the supreme court of the District of Columbia	1	1
Caption	1	1
Petition	1	1
Exhibit D. C. No. 1—Map of proposed extension	2	2
Order of publication	3	2
Memorandum: Proofs of publication filed	3	3
Jury ordered to be summoned	4	3
Verdict, with schedules	4	4
Verdict, &c., confirmed *nisi*, with marshal's return	9	9
Exceptions to award	13	12
Motion to confirm verdict, &c.	14	14
Memorandum: Proofs of publication of order *nisi* filed	15	14
Motion for leave to traverse marshal's return, and notice	15	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 19, 1900.

	Original.	Print
Affidavit of W. Riley Deeble	16	15
John C. Davidson	17	16
Verdict, award, and assessment of jury confirmed	18	17
Appeal	19	18
Citation	19	18
Memorandum: Appeal bond filed	20	19
Clerk's certificate	20	19
Minute entry of argument	21	19
Opinion	22	20
Decree	26	27
Order allowing appeal	27	28
Citation and service	28	28
Clerk's certificate	30	28

1 In the Court of Appeals of the District of Columbia.

CHARLES H. DAVIDSON ET AL., Trustees, Appellants,
vs.
JOHN B. WIGHT ET AL., Comm'rs D. C. } No. 958.

Supreme Court of the District of Columbia.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS.
No. 549. District Court.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss*:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition of John B. Wight, John W. Ross, and Lansing H. Beach for Condemnation Proceedings.

Filed Mar. 31, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court of the United States for said District.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS.

To the supreme court of the District of Columbia, sitting as a district court:

The petition of John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, respectfully shows as follows:

1. That Congress, by act approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes," directed your petitioners to institute by a petition in this court a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one (4-) and forty-two (42) of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia: Provided that the owners of the "Kall" tract dedicate the land in said tract contained within the lines of said streets.

2. That the owners of the aforesaid "Kall" tract have
2 dedicated to the District of Columbia for highway purposes the land in said tract contained within the lines of S, Twenty-second, and Decatur streets.

3. That a map of the proposed extension of S, Twenty-second, and Decatur streets, showing the number and designation of lots affected, the names of the owners thereof, and the areas of land required for the extension, has been prepared, and a copy thereof

is hereto annexed as part of this petition, marked "Exhibit D. C. No. 1."

4. That said act of Congress further provides that of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as therein provided for.

Wherefore your petitioners pray this honorable court to direct the marshal of the District of Columbia to summon a jury of seven judicious disinterested men, not related to any party interested, to be and appear on the premises, on a day specified, to assess the damages, if any, which each owner of land through which S, Twenty-second, and Decatur streets are proposed to be extended, as aforesaid, may sustain by reason thereof, and that such other and further orders may be made and proceedings had as are contemplated by said act of Congress and by chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over said lands may be obtained and secured for the extension of S, Twenty-second, and Decatur streets aforesaid; and they will ever pray, etc.

JOHN B. WIGHT,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Petitioners.

(Here follows map marked "Exhibit D. C. No. 1," p. 4.)

3 *Order of Publication.*

Filed Apr. 3, 1899.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS NORTHWEST. No. 549.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an act of Congress approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes," have filed a petition in this court praying the condemnation of the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one (41) and forty-two (42) of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, a part of Widow's Mite, as shown on a plat or map prepared by said Commissioners and annexed to their

FOLD OUT IS TOO LARGE TO BE FILMED

said petition and marked "Exhibit D. C. No. 2," and praying also that a jury be summoned by the marshal, in accordance with chapter eleven of the Revised Statutes of the United States relating to the District of Columbia, to ascertain and assess the damages, if any, which each owner of land through which S, Twenty-second, and Decatur streets are proposed to be extended may sustain by reason thereof, and to assess not less than one-half of the amount found due and awarded as damages by the jury in said proceedings against the pieces or parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as they are proposed.

It is ordered, this 3rd day of April, 1899, that all persons interested in the proceedings be, and they are hereby, required to appear in this court on or before the — day of April, 1899, and show cause, if any they have, why the prayer of said petition should not be taken: Provided a copy of this order be published in the Washington Post and the Washington Times newspaper- at least six times and in the Washington Law Reporter once before said 22nd day of April, 1899.

By the court:

W. S. COX, *J.*

Memoranda.

April 14, 1899.—Proof of publication in Washington Law Reporter filed.

May 12, 1899.—Proof of publication in Washington Times filed.

4 *Order to Summon Jury.*

Filed Jul- 21, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF "S," TWENTY-SECOND, AND DECATUR STREETS. No. 549.

Notice by advertisement ordered herein having been duly published, now, on consideration of the petition of the Commissioners of the District of Columbia filed herein, it is this 21st day of July, 1899, on motion of counsel for said Commissioners, *ordered* that the United States marshal for the District of Columbia summon a jury of seven judicious, disinterested men not related to any party interested in this proceeding, to be and appear upon the premises described in the petition herein, on a day specified, to assess the damages, if any, which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend "S," Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as prayed in said petition, and of the amount found due and awarded as damages by said jury in respect of the land condemned for the opening of said streets not less

than one-half thereof shall be assessed by said jury against the pieces and parcels of ground situated and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets, and to further proceed in accordance with the act of Congress approved March 3, 1899, entitled "An act to extend 'S' street in the District of Columbia, and for other purposes."

By the court:

A. C. BRADLEY.

Verdict.

Filed Aug. 30, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re THE EXTENSION OF S, 22ND, AND DECATUR STREETS. No. 549.

United States marshal's office.

WASHINGTON, D. C., *August* 30, 1899.

To the honorable the justice of said court:

As directed by the order of the court passed in the above-entitled cause, I summoned the following jury of seven judicious, disinterested men, not related to any party interested in this proceeding: William S. Knox, Frank K. Raymond, James P. Willett, James F. Oyster, Harry B. Parker, Clement W. Howard, Charles Worthington, to be and appear on the premises described in the petition herein on Thursday, August 24, A. D. 1899, at 11 o'clock a. m., meeting at the corner of 21st street and Florida avenue, and from thence to proceed to view the premises to be condemned for said purpose, and to assess the damages for the land condemned, and to assess not less than one-half of those damages against those parcels of land lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets, as provided by the act of Congress approved March 3, 1899.

The said jury met on said premises on the day and date aforesaid, and took and subscribed the oath herewith returned, and, after viewing the premises, adjourned to meet at the city hall on Friday, August 25, 1899, at 11 o'clock a. m., to take testimony and hear evidence in the case. The said jury met and took testimony and heard evidence on August 25, 1899, and on August 28 said jury also met and heard evidence and arguments of counsel, viz., A. B. Duvall, Esq., on behalf of the Commissioners of the District of Columbia, and J. J. Darlington, Esq., on behalf of Mr. Leroy Tuttle, and W. Riley Deeble, representing the Kall tract. On August 29 and 30 said jury also met and made up their verdict and award, which is hereto attached; and, in pursuance to the statutes, section 252, R. S. D. C., I herewith transmit the same to the court.

The following-named witnesses were examined on behalf of the petitioners: William P. Richards, John C. Davidson, W. Riley Deeble.

And the following-named witnesses were examined on behalf of the property-owners: Leroy Tuttle, Clarke K. Tilton, Henry Simpson, Z. M. Knott, and William W. Souder.

Mr. Leroy Tuttle, the owner of the property to be condemned, was on August 11, 1899, personally served with the following notice of the time and place of the meeting of the jury and was present with his counsel, J. J. Darlington, Esq., when the jury was sworn:

"UNITED STATES MARSHAL'S OFFICE,
WASHINGTON, D. C., *Aug.* 10, 1899.

Mr. Leroy Tuttle:

This is to notify you that, pursuant to the order of the supreme court of the District of Columbia, holding a district court, in case No. 549, in the matter of the condemnation of land necessary to open and extend 'S,' Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, a part of Widow's Mite, as set forth in the petition filed in the said case, a jury of seven judicious, disinterested men, not related to any party interested in any of the property in any way affected by said proceeding, have been summoned by me to meet on Thursday, the 24th day of August, 1899,
6 at eleven o'clock a. m., at the corner of Twenty-first street and Florida avenue, to proceed to view the premises to be condemned, and to assess the damages for the land condemned, and to assess not less than one-half of those damages against the pieces and parcels of ground situated and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets, as provided by act of Congress approved March 3, 1899.

Very respectfully, AULICK PALMER, *Marshal.*"

The oath taken and subscribed by the jury and their verdict, assessment, and award are hereto appended.

Very respectfully, AULICK PALMER, *Marshal,*
By W. B. ROBINSON,
Chief Deputy Marshal.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

We, the undersigned, the jury summoned and empaneled by the marshal of the District of Columbia to ascertain and award the damages which each owner of land may sustain by reason of the condemnation of land necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, a part of Widow's Mite, and to assess not less than one-half of those damages against the pieces and parcels of ground situate and lying on each side of the extension of said street, and also on all or any adjacent premises or parcels of land which will be benefited by the opening of said street, as provided by act of Congress approved March 3, 1899, do solemnly swear on our several oaths that we are disinter-

ested, not related to any party interested in any of the property in any way affected by this proceeding, and that, without favor or partiality to any one, to the best of our judgment we will decide what damages each owner may sustain by reason of the extension of S, Twenty-second, and Decatur streets, as aforesaid, and that we will assess not less than one-half the aggregate amount of said damages as provided by law.

CLEMENT W. HOWARD. [SEAL.]
JAMES P. WILLETT. [SEAL.]
JAS. F. OYSTER. [SEAL.]
W. S. KNOX. [SEAL.]
FRANK K. RAYMOND. [SEAL.]
HARRY B. PARKER. [SEAL.]
CHARLES WORTHINGTON. [SEAL.]

Subscribed and sworn to before me this 24th day of August, 1899.

AULICK PALMER,
U. S. Marshal,
By W. B. ROBINSON,
Deputy Marshal.

7 In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS.
No. 549.

We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken, necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as shown on the plat or map filed with the petition in this cause, as set forth in Schedule 1, hereto annexed as part hereof:

And we, the jury aforesaid, in accordance with the act of Congress approved March 3, 1899, for the extension of said streets, do hereby assess the sum of $26,000, being not less than one-half of the damages so, as aforesaid, awarded in Schedule 1 against the pieces and parcels of land situate and lying on each side of the extension of said streets, and also on adjacent pieces or parcels of land which we find will be benefited by the extension of said streets, as set forth in Schedule 2, hereto annexed as part hereof.

As witness our hands and seals this 30th day of August, A. D. 1899.

WM. S. KNOX. [SEAL.]
FRANK K. RAYMOND. [SEAL.]
JAMES P. WILLETT. [SEAL.]
JAS. F. OYSTER. [SEAL.]
HARRY B. PARKER. [SEAL.]
CLEMENT W. HOWARD. [SEAL.]
CHARLES WORTHINGTON. [SEAL.]

SCHEDULE # 1.

Award of Damages for the Extension of S, 22nd, and Decatur Streets.

Description of piece or parcel of land taken.	Area taken.	Award of damages.
Parts of lots 41 and 42 of Phelps and Tuttle's subdivision of "Widow's Mite," included within the lines of S and 22nd streets extended, as shown on map accompanying petition in this cause	20,868.9 sq. ft.	$36,000.00
Part of lot 41 of Phelps and Tuttle's subdivision of "Widow's Mite," included within the lines of Decatur place extended, as shown on the map annexed to petition in this cause	12,560.4 "	16,000.00

8 SCHEDULE # 2.

Assessment of Benefits for the Extension of S, 22nd, and Decatur Streets.

Description of piece or parcel of land benefited.	Name of owner.	Benefits.
Lot 1, block 13, Kalorama Heights subdivision.	Charlotte B. Lovett	$125.
Lot 2, block 13, Kalorama Heights subdivision.	A. J. Drexel	100.
Lot 3, block 13, Kalorama Heights subdivision.	Wm. W. Kurtz	100.
Lot 4, block 13, Kalorama Heights subdivision.	Randolph Ellis	100.
Lot 5, block 13, Kalorama Heights subdivision.	Stephen A. Caldwell	100.
Lot 25, block 12, Kalorama Heights subdivision	Inez R. Crawford	100.
Lot 26, block 12, Kalorama Heights subdivision	John C. Bullitt	100.
Lot 27, block 12, Kalorama Heights subdivision	John L. Welsh	100.
Lot 28, block 12, Kalorama Heights subdivision	E. J. Stellwagen	100.
Lot 29, block 12, Kalorama Heights subdivision	Thos. M. Gale	100.
Lot 30, block 12, Kalorama Heights subdivision	Stephen A. Caldwell	125.
Lot 31, block 12, Kalorama Heights subdivision	A. J. Drexel	50.
Part of the Kall tract described as follows: Beginning at the intersection of the north line of S street with the east boundary of Kalorama Hts. subdivision, thence east 451.62 feet, thence north 21.14 west 107.2 feet, thence west 461.2 feet, thence south 25.50 east to the place of beginning	Charles H. Davidson, Albert A. Wilson, John B. Larner, Trustees,	6,000.00
Part of the Kall tract as follows: Beginning at the southwest corner of S and 22nd street-, west 388.67 —, thence south 25.50 east 88.35 feet, thence south 24 47 east 266.19 feet, thence east 104.73 feet, thence north 195 feet to place of beginning	Charles H. Davidson, Albert A. Wilson, John B. Larner, Trustees,	5,000.00

Schedule # 2—Continued.

Description of piece or parcel of land benefited.	Name of owner.	Benefits.
Part of the Kall tract as follows: Beginning at the northeast corner of Decatur place and 22nd street, thence east 156.27 feet, thence north 40 10 west 242.07 feet, thence south 184.98 feet to the beginning	Charles H. Davidson, Albert A. Wilson, John B. Larner, Trustees,	1,000.00
Part of the Kall tract as follows: Beginning at a point of the intersection of the east side of 22nd street with the north boundary of Kalorama Heights subdivision, thence north 29.89 feet, thence east 206.95 feet, thence south 40.10 east 60.54 feet, thence south 50.13 east 108 feet, thence south 23.07 west 59.9 feet, thence in straight line to beginning	Charles H. Davidson, Albert A. Wilson, John B. Larner, Trustees,	2,000.00
9 Lot 44, Phelps and Tuttle's subdivision of "Widow's Mite"	Leroy Tuttle	300.
Lot 43, Phelps and Tuttle's subdivision of "Widow's Mite"	Leroy Tuttle	500.
Part of lot 42 of Phelps and Tuttle's subdivision of "Widow's Mite" as follows: Beginning at the southeast corner of said lot 42, thence north 18.9 west 50 feet, thence south 71.51 west 163.37 feet, thence south 21.14 east 21.08 feet, thence east 92.93 feet, thence to the beginning	Leroy Tuttle	1,300.
Part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most northerly corner of said lot 41, thence south 54.08 east 39.3 feet, thence west 102.09 feet, thence in a straight line to the place of beginning	Leroy Tuttle	100.
Part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most easterly corner of lot 41, thence north 54.08 west 224.79 feet, thence west 248.88 feet, thence south 11.02 feet, thence south 40.10 east 242.07 feet, thence east 247.47 feet, thence north 22.07 east 69.91 feet to place of beginning	Leroy Tuttle	7,600.
Part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most southerly corner of said lot 41, thence north 23.07 east 125.43 feet, thence west 171.21 feet, thence south 40.10 east 60.54 feet, thence south 50.13 east 108 ft. to place of beginning	Leroy Tuttle	1,000.

Attested:

AULICK PALMER,
U. S. Marshal,
By W. B. ROBINSON,
Chief Deputy Marshal.

Order Nisi Confirming Verdict, Award, and Assessment of Jury.

Filed Sep. 19, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS.
No. 549.

It appearing to the court that on the 30th day of Aug't, 1899, there was filed in this cause the verdict and award of the jury summoned by the marshal under the order heretofore passed herein to ascertain and award damages which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as shown on a plat or map filed with the petition of the Commissioners D. C., and to assess not less than one-half the amount found due and awarded for damages for and in respect of the land condemned for the extension of said S, Twenty-second, and Decatur streets against those pieces or parcels of land situate and lying on each side of the extension of said streets, and also on adjacent pieces or parcels of land which will be benefited by said extension, and that in and by said verdict said jury has found due and awarded as and for damages for and in respect of the land condemned herein, *viz:*

Parts of lot- 41 and 42 of Phelps and Tuttle's subdivision of "Widow's Mite," included within the lines of S and 22nd streets extended, as shown on the map accompanying the petition in this cause, the sum of thirty-six thousand dollars.

Part of lot 41 of Phelps and Tuttle's subdivision of "Widow's Mite," included within the lines of Decatur place extended, as shown on the map annexed to the petition in this cause, the sum of sixteen thousand dollars.

And that in and by said verdict said jury has assessed not less than one-half of the aforesaid amount found due and awarded as and for damages against the following pieces or parcels of land, *viz:*

Against the following-named lots in block 13, Kalorama Heights subdivision:

Lot 1—Charlotte B. Lovett, owner—the sum of one hundred and twenty-five dollars ($125).

Lot 2—A. J. Drexel, owner—the sum of one hundred dollars ($100).

Lot 3—Wm. W. Kurtz, owner—the sum of one hundred dollars ($100).

Lot 4—Randolph Ellis, owner—the sum of one hundred dollars ($100).

Lot 5—Stephen A. Caldwell, owner—the sum of one hundred dollars ($100).

Against the following-named lots in block 12, Kalorama Heights subdivision:

Lot 25—Inez R. Crawford, owner—the sum of one hundred dollars ($100).

Lot 26—John C. Bullitt, owner—the sum of one hundred dollars ($100).

Lot 27—John L. Welsh, owner—the sum of one hundred dollars ($100).

Lot 28—E. J. Stellwagen, owner—the sum of one hundred dollars ($100).

Lot 29—Thos. M. Gale, owner—the sum of one hundred dollars ($100).

Lot 30—Stephen A. Caldwell, owner—the sum of one hundred and twenty-five dollars (125).

Lot 31—A. J. Drexel, owner—the sum of fifty dollars ($50).

Against part of the Kall tract described as follows: Beginning at the intersection of the north line of S street with the east boundary of Kalorama Hts. subdivision, thence east 451.62 feet; thence north
21.14 west 107.2 feet; thence west 461.2 feet; thence south
11 25.50 feet to the place of beginning—Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees—the sum of six thousand dollars ($6,000).

Against part of the Kall tract as follows: Beginning at the southwest corner of S and 22nd street-, west 388.67 —; thence south 25.50 east 88.35 feet; thence south 24.27 east 266.19 feet; thence east 104.73 feet; thence north 195 feet to place of beginning—Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees—the sum of five thousand dollars ($5,000).

Against part of the Kall tract as follows: Beginning at the northeast corner of Decatur place and 22nd street, thence east 156.27 feet; thence north 40.10 west 242.07 feet; thence south 184.98 feet to the place of beginning—Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees—the sum of one thousand dollars ($1,000).

Against part of the Kall tract as follows: Beginning at a point of the intersection of the east side of 22nd street with the north boundary of Kalorama Heights subdivision, thence north 29.89 feet; thence east 206.95 feet; thence south 40.10 east 60.54 feet; thence south 50.13 east 108 feet; thence south 23.07 west 59.9 feet; thence in straight line to beginning—Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees—the sum of two thousand dollars ($2,000).

Against lot 44, Phelps and Tuttle's subdivision of Widow's Mite—Leroy Tuttle, owner—the sum of three hundred dollars ($300).

Against lot 43, Phelps and Tuttle's subdivision of Widow's Mite—Leroy Tuttle, owner—the sum of five hundred dollars ($500).

Against part of lot 42 of Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the southeast corner of said lot 42, thence north 18.09 west 50 feet; thence south 71.51 west 163.37 feet; thence south 21.14 east 21.08 feet; thence east 92.93

feet; thence to the beginning—Leroy Tuttle, owner—the sum of one thousand three hundred dollars ($1,300).

Against part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most northerly corner of said lot 41, thence south 54.08 east 39.3 feet; thence west 102.09 feet; thence in a straight line to the place of beginning—Leroy Tuttle, owner—the sum of one hundred dollars ($100).

Against part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most easterly corner of lot 41, thence north 54.08 west 224.79 feet; thence west 248.88 feet; thence south 11.02 feet; thence south 40.10 east 242.07 feet; thence east 247.47 feet; thence north 22.07 east 69.91 feet to place of beginning—Leroy Tuttle, owner—the sum of seven thousand six hundred dollars ($7,600).

Against part of lot 41, Phelps and Tuttle's subdivision of "Widow's Mite," as follows: Beginning at the most southerly corner of said lot (41), thence north 23.07 east 125.43 feet; thence west 171.21 feet; thence south 40.10 east 60.54 feet; thence south 50.13 east 108 feet to place of beginning—Leroy Tuttle, owner—the sum of one thousand dollars ($1,000).

12 It is this 19th day of September, A. D. 1899, upon motion of counsel for the Commissioners of the District of Columbia, ordered that the aforesaid verdict, award, and assessment of said jury in all respects be, and the same is hereby, confirmed unless cause to the contrary is shown on or before the 4th day of October, A. D. 1899, provided a copy of this order be published once in the Washington Law Reporter and twice in the Evening Star before said last-named date; and it is further ordered that the marshal serve a copy of this order personally on all the owners of land condemned and all the owners of land assessed in said verdict, with one-half of the damages awarded therein, who may be found within the District of Columbia, and if not found therein, then by mailing a copy thereof to the place of abode or last known place of residence of such owner or owners.

A. B. HAGNER,
Asso. Justice.

Marshal's Return.

WASHINGTON, D. C., *September* 29, 1899.

Copies of the order hereto attached were served on the following persons personally September 27, 1899, viz:

E. J. Stellwagen, Charles H. Davidson, Albert A. Wilson, John B. Larner, Randolph Ellis, and W. Riley Deeble.

Sept. 25, 1899, copy of said notice served personally on E. J. Stellwagen as agent for Thomas M. Gale, now on the high seas en route from Europe.

Sept. 29, 1899, copy of said notice served personally on Myron M. Parker as agent for Inez R. Crawford, whereabouts unknown.

Sept. 21, 1899, mailed copies of the said notice in postpaid official

envelopes to the following persons at their last known place of residence, viz:

A. J. Drexel, Drexel bldg., Philadelphia, Pa.

Wm. W. Kurtz, Bullitt bldg., Philadelphia, Pa.

Stephen A. Caldwell, Fidelity Trust Insurance and Safe Deposit Co., Philadelphia, Pa.

John C. Bullitt, Bullitt bldg., Philadelphia, Pa.

John L. Welsh, 304 Walnut Str., Philadelphia, Pa.

Sept. 28, 1899, mailed copies of the said notice in postpaid official envelopes to the following persons at their last known place of residence, viz:

Charlotte B. Lovett, Hotel Cedarmere, Coboury, Ontario, Canada.

Le Roy Tuttle, 13 Rutger Str., Utica, N. Y

AULICK PALMER,
U. S. Marshal, D. C.

R.

13 *Exceptions to Award.*

Filed Oct. 4, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S STREET, 22ND STREET, AND DECATUR STREET upon Petition of the Commissioners of said District. No. 549, Docket No. 2.

Exceptions to the confirmation of the award and finding of the jury in the above-entitled cause as to the owners of the tract of land known and described in these proceedings as the Kall tract.

Now come the respondents, Charles H. Davidson and Albert A. Wilson and John B. Larner, trustees, and except and object to the confirmation of the award and finding of the jury in respect to that tract or parcel of land situate in the county of Washington, District of Columbia, known as the Kall tract, and as more particularly described in the petition and proceedings in this cause, to which reference is hereby made, and to the assessment of damages made by said jury in respect to each and every part and parcel of said tract, because they say:

First. Said award of damages and finding of the jury is not warranted by the statute under which these proceedings are had and taken, and by a proper construction thereof no damage can be assessed against said tract of land, or any part thereof, or these respondents as owners of said land.

Second. Because said act is unconstitutional and void, in that it contains no provision for notifying the owners of property to be assessed in advance of said assessment, nor at any time pending the consideration of the cause by the jury, nor is any mode designated by the statute by which the objections of the owners whose land is sought to be charged with benefits can be properly heard or considered, or by which any objection they may have to such as-

sessment might be made effective, and for other vices and defects apparent upon the face of the statute.

Third. Because the statute under which said assessment is made is a statute relating to a condemnation of land solely, and contains no provision touching the assessment of benefits, and was not intended to provide for such assessment.

Fourth. Because the statute authorizing the extension of said streets, and the condemnation of land therefor, and the assessment of benefits is, when taken in connection with the statute under which the condemnation proceedings were to be conducted, inconsistent and incapable of enforcement as to the assessment of benefits against property forming no part of that sort to be condemned.

Fifth. Because the description of the property sought to be charged with the assessment of benefits is inaccurate, insufficient, and defective.

14 Sixth. Because said award of damages and finding of the jury in that behalf is excessive, unjust, and unreasonable.

These respondents therefore, each and severally, request and demand said award and finding to be set aside, and that a new jury be empannelled in accordance with the provision of the statute in such case made and provided.

CHARLES H. DAVIDSON.
ALBERT A. WILSON, *Trustee.*
JOHN B. LARNER, *Trustee.*

B. F. LEIGHTON,
Attorney for Respondents.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, C. Clinton James, a notary public in and for said District, Charles H. Davidson and made oath in due form of law that he is the owner of that certain tract or parcel of land situate in the county of Washington, District of Columbia, known as the Kall tract, subject to a certain deed of trust made to secure a certain indebtedness unto the Washington Loan and Trust Company, in which the respondents hereto, Albert A. Wilson and John B. Larner, are trustees; that, in his judgment, the finding of the jury and their assessment of benefits for said property in these proceedings described as the Kall tract is excessive, unjust, and unreasonable. Especially is this true when it is considered that respondents have donated the land included within the limits of S streets, so far as said Kall tract is concerned, which amounts to somewhere in the vicinity of — square feet of ground. In justice to respondents and the persons whom they represent, said award ought, in the judgment of affiant, to be set aside and for naught held.

CHARLES H. DAVIDSON.

Subscribed and sworn to before me this 4th day of October, A. D. 1899.

[SEAL.]

C. CLINTON JAMES,
Notary Public, D. C.

Motion to Confirm Verdict, Assessment, and Award of Jury.

Filed Oct. 9, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS. No. 549.

Now come the petitioners herein, The Commissioners of the District of Columbia, and move the court to finally confirm the verdict, award, and assessment of the jury filed herein, notwithstanding the exceptions filed thereto.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys, D. C.

15 To Messrs. B. F. Leighton and J. J. Darlington, attorneys for exceptants:

Please take notice that Mr. Justice Hagner, holding the district court, has set the above motion for hearing on Monday, October 16, 1899, at 10 o'clock a. m.

Very respectfully,

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys, D. C.

Memorandum.

October 30, 1899.—Proofs of publication of order *nisi* in Washington Law Reporter, Washington Post, and the Evening Star, filed.

Motion for Leave to Traverse Marshal's Return & Notice of Motion.

Filed Oct. 31, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S STREET, 22ND STREET, AND DECATUR STREET upon Petition of the Commissioners of said District. No. 549, Docket No. 2.

Now come the respondents, Charles H. Davidson and Albert A. Wilson and John B. Larner, trustees, by Benjamin F. Leighton, Esq., their attorney, and move the court for leave to traverse the return of the marshal filed in said cause, with the award of the jury, in so far as it states that the owners of that certain tract and parcel of ground, described in said proceedings as the Kall tract, were represented before said jury and in the hearing of said cause by one W. Riley Deeble, and ask leave of the court to file affidavits

in support of this their motion or to submit such proof as the court may direct in verification and support thereof.

B. F. LEIGHTON,
Attorney for Respondents.

Take notice that I will call the above motion to the attention of criminal court No. 2, Justice Cole presiding, on Saturday, Nov. 4th, at ten o'clock a. m., or as soon thereafter as counsel may be heard.

B. F. LEIGHTON,
Attorney for Respondents.

To Messrs. A. B. Duvall and C. A. Brandenburg.

16 *Affidavit of W. Riley Deeble.*

Filed Oct. 31, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION of "S" STREET, 22ND STREET, AND DECATUR STREET upon Petition of the Commissioners of the said District. No. 549, Docket No. 2.

W. Riley Deeble on oath deposes and says that he is a citizen of the United States and a resident of said District; that he has been doing a general real-estate business in the city of Washington, District of Columbia, for the last fourteen years; that he is the same person who appeared as a witness in the above-entitled cause; that it appears by the return of the marshal accompanying the verdict of the jury in said cause that he, affiant, represented the Kall tract and was present at the taking of the evidence and hearing in said cause. He states that the facts in regard to said cause are, so far as he is concerned, as follows: That at the time said cause was set for hearing he was out of this jurisdiction, and while the cause was in progress, after the jury had viewed the land and taken some testimony, he returned to the city and found that the cause was in progress, and at the request of Mr. Richards and Mr. Duvall, who represented the District in the prosecution of the suit, he appeared in said cause as a witness and in no other capacity or character. He was familiar with the values of property in that vicinity, and it was because of his knowledge as a real-estate agent that he was called into the case. He did not represent in any way or pretend to represent the owners of the Kall tract. Affiant says that he has an undivided sixteenth equitable interest in said property, and that is the extent of his interest in said tract; that the other owners of said property did not request him to appear there for them; that he did not represent them in any way or shape, and did not pretend to so represent them before the jury. He did not consider himself as having any right to cross-examine witnesses or to make any address to the jury, and he did not cross-examine any witness that was produced while he was present in court, nor did he address the

jury, nor did he act in any way in the character of counsel in the case. He considered himself simply in the light of a witness seeking to give the District the benefit of what knowledge he had in respect to values in that vicinity, and especially as he had been instrumental in securing the legislation which resulted in the bill under which these proceedings were instituted. The other equitable owners, except affiant and John C. Davidson, were all out of the city at the time on their summer vacations. Affiant is not advised what the equitable interest of John C. Davidson is; that affiant was only present on Friday, Aug. 25, & Monday, August 28th,
17 and at no other time during the sitting of the said jury or the hearing in said cause. He states further that he consulted with A. B. Duvall, Esquire, at his request, who represented the District in the prosecution of said cause; told him what he could swear to; that an outline of the testimony already given in the case was given to him by Mr. Duvall, and that throughout he acted and was treated simply as a witness in the case of the condemnation of the land belonging to Mr. Tuttle and in no other way or capacity, and so far as the said return states otherwise it is erroneous and not true in point of fact. Further affiant says not.

W. RILEY DEEBLE.

Subscribed and sworn to before me this 31st day of October, A. D. 1899.

CHARLES G. SHOEMAKER,
[SEAL.] *Notary Public.*

Affidavit of John C. Davidson.

Filed Nov. 3, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF "S" STREET, 22ND STREET, AND DECATUR STREET upon Petition of the Commissioners of the said District. No. 549, Docket No. 2.

John C. Davidson on oath deposes and says that he is a citizen of the United States and a resident of said District; that he has been doing a general real-estate business in the city of Washington, District of Columbia, for the last fourteen years; that he is the same person who appeared as a witness in the above-entitled cause; that it appears by the return of the marshal accompanying the verdict of the jury in said cause that he, affiant, represented the Kall tract and was present at the taking of the evidence and hearing in said cause. He states that the facts in regard to said cause are, so far as he is concerned, as follows: That at the request of Mr. Richards and Mr. Duvall, who represented the District in the prosecution of the suit, he appeared in said cause as a witness and in no other capacity or character. He was familiar with the values of property in that vicinity, and it was because of his knowledge as a real-estate agent

that he was called into the case. He did not represent in any way or pretend to represent the owners of the Kall tract.

Affiant says that he has an undivided seven-thirty-seconds ($\frac{7}{32}$) equitable interest in said property, and that is the extent of his interest in said tract; that the other owners of said property did not request him to appear there for them, and that he did not represent them in any way or shape and did not pretend to so represent them before the jury. He did not consider himself as having any
18 right to cross-examine witnesses or to make any address to the jury, and he did not cross-examine any witness that was produced while he was present in court, nor did he address the jury, nor did he act in any way in the character of counsel in the case. He considered himself simply in the light of a witness seeking to give the District the benefit of what knowledge he had in respect to values in that vicinity. The other equitable owners, except affiant and W. Riley Deeble, were all out of the city at the time on their summer vacations; that affiant was only present on Friday, August 25th, and Monday, August 28th, and at no other time during the sitting of the said jury or the hearing in said cause. He states further that he consulted with A. B. Duvall, Esquire, at his request, who represented the District in the prosecution of said cause; told him what he could swear to; that an outline of the testimony already given in the case was given to him by Mr. Duvall, and that throughout he acted and was treated simply as a witness in the case of the condemnation of the land belonging to Mr. Tuttle, and in no other way or capacity, and so far as the said return states otherwise it is erroneous and not true in point of fact. Further affiant says not.

JOHN C. DAVIDSON.

Subscribed and sworn to before me this third day of November, A. D. 1899.

JOHN E. MITCHELL,
[SEAL.] *Notary Public, D. C.*

Order Confirming Verdict, Award, and Assessment of Jury.

Filed Nov. 18, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re THE EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS. No. 549.

This cause coming on to be heard on the exceptions filed by Leroy Tuttle and by Charles H. Davidson, Albert A. Wilson, and John B. Larner, trustees, to the written verdict, award, and assessment of the jury filed herein, and it appearing to the court that the order *nisi* confirming said verdict, award, and assessment of said jury has been duly published, as therein provided, and that the owners of the property taken for the extension of said streets and

the owners of the land assessed with one-half of the amount awarded for damages have been duly notified of the pendency of this proceeding and of said assessments, as provided by the order of the court heretofore passed herein, it is this 18th day of November, A. D. 1899, by the court, after argument of counsel for the said exceptants and the petitioners, and due consideration of the premises, *adjudged, ordered,* and *decreed* that the aforesaid exceptions be, and the same are hereby, overruled, and that the aforesaid verdict,
award, and assessment be, and the same is hereby, in all re-
19 spects confirmed, and the marshal is hereby directed to
transmit the aforesaid verdict, award, and assessment to the Commissioners of the District of Columbia, in accordance with law.

CHAS. C. COLE,
Asso. Justice.

Notice of Appeal.

Filed Nov. 22, 1899.

In the Supreme Court of the District of Columbia, Holding a District Court for said District.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS. No. 549.

Now come Charles H. Davidson and A. A. Wilson and John B. Larner, trustees, by B. F. Leighton, Esq., their attorney, and appeal to the Court of Appeals of the District of Columbia from the judgment or decree in the above-entitled case overruling the exceptions to the verdict and assessment of the jury made and filed by them in said case and confirming the same, passed or pronounced herein on the 18th day of November, A. D. 1899.

B. F. LEIGHTON,
Attorney for Charles H. Davidson and A. A. Wilson and John B. Larner, Trs.

In the Supreme Court of the District of Columbia.

In re EXTENSION OF S, TWENTY-SECOND, AND DECATUR STREETS. No. 549, Dist. Court.

The President of the United States to John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 22d day of November, 1899, wherein Charles H. Davidson and A. A. Wilson and John B. Larner, trustees, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 22d day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN R. YOUNG, *Clerk.*

20 Service of the above citation accepted this 22 day of Nov., 1899.

A. B. DUVALL,
Attorney for Appellees.

Memorandum.

November 27, 1899.—Appeal bond filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 39, inclusive, to be a true and correct transcript of the record (as prescribed by rule 5 of the Court of Appeals of the District of Columbia) in case No. 549, District court, *In re* extension of S, Twenty-second, and Decatur streets, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, the 9th day of January, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 958. Charles H. Davidson *et al.*, trustees, appellants, *vs.* John B. Wight *et al.*, Comm'rs D. C. Court of Appeals, District of Columbia. Filed Jan. 11, 1900. Robert Willett, clerk.

21 THURSDAY, *April 5th, A. D.* 1900.

CHARLES H. DAVIDSON and A. A. WILSON and JOHN B. Larner, Trustees, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. BEACH, Commissioners of the District of Columbia. } No. 958.

The argument in the above-entitled cause was commenced by Mr. B. F. Leighton, attorney for the appellants, and was continued by Messrs. C. A. Brandenburg and A. B. Duvall, attorneys for the appellees, and was concluded by Mr. B. F. Leighton, attorney for the appellants.

22 CHARLES H. DAVIDSON and A. A. WILSON and John B. Larner, Trustees, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. BEACH, Commissioners of the District of Columbia. } No. 958.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an order or decree of the supreme court of the District of Columbia confirming an assessment upon lands of the appellants for alleged benefits accruing from the opening of certain streets adjoining such lands.

By an act approved March 3, 1899, entitled "An act to extend S street, in the District of Columbia, and for other purposes" (30 Stat., p. 1344), the Congress of the United States provided that, within thirty days after the passage of the act, the Commissioners of the District should "institute by a petition in the supreme court of the District, sitting as a district court, a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite; *provided* that the owners of the 'Kall' tract should dedicate the land in said tract contained within the lines of said streets; *and provided further* that of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces or parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

The act further provided that the proceedings for condemnation should be under and in accordance with chapter 11 of the Revised Statutes of the United States relating to the District of Columbia; that the sum to be assessed against each parcel of ground should be determined by the jury; and that each assessment should be a lien upon the land assessed, and payable in five equal instalments, with interest at the rate of 4 per centum per annum.

In pursuance of the act the Commissioners of the District filed a petition in the supreme court of the District, setting forth in substance the provisions of the act and averring that the owners of the Kall tract had dedicated to the District of Columbia for the purpose of a highway the land in said tract contained within the streets proposed to be extended; and they prayed for process and such further proceedings as were contemplated by the act of Congress. There was no personal service of process upon any of the parties in interest; but on April 3, 1899, the court made an order directing that all persons in interest should appear in court before the — day of that month, and show cause, if any they had, why the prayer of the petition should not be granted. And it directed publication of the order in three specified newspapers published in the city of Wash-

ington. The record contains evidence of publication in two of these three newspapers, but not in the third. It is conceded, however, in the brief filed on behalf of the appellants that due proof of the publication was made as required by the terms of the order.

The next step in the case, so far as the record discloses, appears to have been taken on July 21, 1899, when, on motion of counsel for the Commissioners, the court made an order directing the marshal to summon a jury of seven disinterested persons not related to any party interested in the proceeding, "to be and appear upon the premises described in the petition herein, on a day specified, to assess the damages, if any, which each owner of land may sustain by reason of the condemnation of the land necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite, as prayed in said petition, and of the amount found due and awarded as damages by said jury in respect of the land condemned for the opening of said streets not less than one-half thereof shall be assessed by said jury against the pieces or parcels of ground situated and lying on each side of the extension of said streets, and also on any and all adjacent pieces or parcels of land which will be benefited by the opening of said streets, and to further proceed in accordance with the act of Congress approved March 3, 1899, entitled 'An act to extend S street in the District of Columbia and for other purposes.'" The latter part of this order, as will be perceived, repeated the specific language of the act of Congress.

Next follows a return made by the marshal of the proceedings had under this order. He recites that he summoned a jury of seven persons, whose names he gives; that these persons were sworn and appeared on the premises on August 24, 1899; that they adjourned to meet next day at the city hall to take testimony in the case; that on August 25, 1899, they took testimony; that on August 28, 1899, they heard evidence and argument of counsel, A. B. Duvall, Esq., appearing on behalf of the Commissioners, J. J. Darlington, Esq., on behalf of Mr. Leroy Tuttle, and W. Riley Deeble representing the Kall tract; that Leroy Tuttle, the owner of the tract to be condemned, had been personally summoned and was present before the jury with his counsel; and that the jury, on August 30, 1899, returned their verdict, which the marshal therewith transmitted to the court. In this verdict the jury found the value of the property to be taken, being about 33,429 square feet, to be of the value of $52,000, and assessed that sum as the amount of damages to be paid as compensation to the owner. At the same time they assessed benefits to the amount of $26,000 on adjacent lots, of which the sum of $10,800 was assessed on Tuttle's remaining property, the sum of $14,000 on four several parcels of the Kall tract held by the appellants as trustees, and an aggregate sum of $1,200 on twelve other pieces of land in the vicinity.

Upon this return of the marshal and verdict of the jury, the court on September 19, 1899, entered an order of confirmation *nisi*, directing that the verdict, award, and assessment should stand confirmed,

unless cause to the contrary were shown on or before October 4, 1899; also, that copies of the order *nisi* should be published in certain specified newspapers in the city of Washington, and that a copy of the order should be personally served by the marshal on all the owners of the land condemned and on all the owners of the land assessed in the verdict, who could be found within the District; and if they could not be found, that a copy should be mailed to their place of abode or last known place of residence.

23 The appellants were duly served with this notice; and they came in and filed exceptions to the confirmation of the award and finding of the jury. The grounds of objection, as stated, were that the statute did not warrant any assessment against the Kall tract; that the statute was unconstitutional inasmuch as it provided for no adequate notice to the persons to be assessed; that the statute under which the assessment was made provided for condemnations only, and not for assessments; that the act of March 3, 1899, taken in connection with the provisions of the Revised Statutes under which the proceedings were had, is inconsistent and incapable of enforcement as to assessments for benefits; that the description of the property sought to be charged with the assessments was defective; and that the award was excessive, unjust and unreasonable. And thereupon they requested that a new jury should be impanneled, in accordance with section 263 of the Revised Statutes of the United States relating to the District of Columbia. The appellants also filed with their exceptions an affidavit of W. Riley Deeble and an affidavit of John C. Davidson, both of whom had appeared as witnesses before the jury for the petitioners, and of whom one W. Riley Deeble was stated in the marshal's return to have appeared on behalf of the owners of the Kali tract. From these affidavits it appeared that neither Deeble nor Davidson, although each owned an equitable undivided interest in the Kall tract, appeared before the jury to represent that tract or its owners.

The exceptions to the award and findings of the jury were overruled; and the court ratified and confirmed the verdict, award, and assessment. From the order of ratification the present appeal has been prosecuted.

The principal questions raised by the assignments of error are two:—1. That of the constitutionality of the act of Congress under which the proceedings have been had; and 2. That of the sufficiency of the notice given to the appellants in respect of the assessments upon their property.

1. With respect to the first of these questions, we think that it has been conclusively determined for us by the decision of the Supreme Court of the United States in the case of Norwood *v.* Baker, 172 U. S., 269. As we understand that decision, which undoubtedly has the effect of greatly qualifying the previous expressions of the same high tribunal upon the matter of special assessments, the limit of assessment on the private owner of property is the value of the special benefit which has accrued to him from the public improvement adjacent to his property. The Supreme Court by Mr. Justice Harlan said in the case of Norwood *v.* Baker: "In our judgment,

the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

In that case there had been, it is true, a gross and most unjustifiable attempt by the public authorities of a municipal corporation to take the property of an individual for the purpose of opening a street through it, and thereafter to assess upon his remaining property which abutted on it the whole cost of the property taken and the cost of the condemnation proceedings,—a most shocking case of confiscation and plunder by public authority under the guise of condemnation and taxation. It was an extreme case; but it awakened the courts to a vigorous assertion of the true principle which should govern in all cases of special assessments made for public improvements. And that principle is, as stated in the case of Norwood *v.* Baker, that the value of the special benefit to the adjacent property from the public improvement, and not the cost of the improvement or any part of such cost as such, is the limitation of assessment upon the property. Necessarily, the cost of the improvement is in itself a limitation beyond which the public authorities cannot go in any case; and a proper limit within such limitation beyond which the assessment should not go may well be prescribed by the legislative authority. But it is a logical and necessary consequence from the rule prescribed that the legislative authority may not arbitrarily prescribe a minimum limit below which the assessment may not fall; for the reason that this in itself would be an assessment irrespective of the actual amount of benefit, and the determination of the amount of actual benefit is not a legislative, but a judicial question, upon which the parties in interest are entitled to be heard and to have their day in court.

It is true that, in the enactment in question, the legislative authority recognizes the principle that the assessment is to be made only on property benefited by the improvement, and provides that the assessment shall be made in a judicial proceeding. But it does not leave the question of special benefits to be determined in such proceeding. It arbitrarily finds for itself that the whole adjacent property subject to assessment, or intended to be assessed, will have been specially benefited to the extent at least of one-half of the cost of the improvement; and all that is left to the jury in the judicial proceeding is not to find the value of the special benefit to each adjacent piece of property, but to apportion at least one-half of the cost, and as much more as they may think proper, between the adjacent lots. This, we think, is in direct contravention of the principle enunciated in the case of Norwood *v.* Baker, and cannot be supported as a valid exercise of legislative authority.

2. We are likewise of opinion that there was no due process of law in this case, inasmuch as the assessment against the property of the appellants was made without notice to them and without opportunity on their part to be heard in regard to it, such as they were entitled to have.

In the case of Allman *v.* District of Columbia, 3 App. D. C., 20, we held that "seasonable notice at some serviceable stage of the proceedings is absolutely necessary to the validity of an assessment." Now, that there was no personal notice or personal service of process on the owners of the Kall tract or any of them at any time before the issue of the order of ratification *nisi* on September 19, 1899, is conceded, and could not, of course, be reasonably controverted
24 in view of the record before us; and it would be a mere waste of time and words to argue that the notice then given was "seasonable notice at a serviceable stage of the proceedings." It then appeared plain that the appellants should have had their day in court, and should have been heard; but it was too late. The jury, which had been charged with the duty of making the assessment, and before which they were entitled to appear and to adduce their testimony with reference to the only matter of vital importance to them in the proceeding, the value of the special benefit accruing to their property from the public improvement in question, had been discharged; and the privilege which was then accorded of showing why a judgment should not be rendered upon the verdict, is not the equivalent of a proper trial before the verdict. This, as we have said, is too plain to us to waste words upon it; and it should be said on behalf of the appellees that it has not been contended by them that this notice to the appellants was sufficient.

Neither can we regard the statement of the marshal in his return that the owners of the Kall tract were represented before the jury, as sufficient evidence of that fact, in view of the distinct and unequivocal denial of it by the persons who were supposed to have appeared as such representatives, and who show conclusively by their affidavits, which are not sought in any manner to be controverted or questioned, that they appeared before the jury as witnesses summoned on behalf of the District of Columbia, and not as representatives of the Kall tract, or of the appellants in this case. And, of course, such appearance cannot be construed as a waiver of notice on the part of the appellants. The statement of the marshal was evidently based upon some misapprehension of the facts, and cannot be held to be binding upon the parties to the cause.

The reliance of the appellees in this matter of due notice to the appellants is, and in fact their sole reliance must be, upon the order of publication that was issued in the first instance on April 3, 1899, immediately after the filing of the petition, together with the act of Congress itself and the circumstances of that legislation. Now, undoubtedly it is fair to presume that the owners of the Kall tract had some agency in procuring the enactment of the legislation in question; since the proviso that it should become effective only upon their dedication to the public of so much of the land within their tract as was required for the opening of the streets enumerated, implies that representations had been made to Congress on their behalf that such dedication would be made. And that they were aware that a suit was intended to be instituted for the purpose contemplated by the proceedings now before us, is very clear; since they knew that the statute contemplated and directed such a proceeding,

and made it mandatory upon the Commissioners of the District to institute the suit within thirty days after the passage of the act, conditioned only upon the dedication by the appellants, which was promptly made by them. The institution of the suit, in fact, was made dependent upon their act of dedication; and they must have known that the suit would necessarily follow that act. But it is not apparent that they are legally and properly chargeable with knowledge beyond this. They were not made parties to the suit, as they well might have been: they were not notified of its institution: they were not notified of any of the proceedings taken under it, until, as we have said, after the order of ratification *nisi* was passed: and we know of no rule of law that would require them to take notice of its pendency and to make themselves parties to it for the protection of their own interest, unless it was incumbent on them so to do by the notice of publication directed to be issued by the order of April 3, 1899. And so ultimately upon the sufficiency of this order of publication to bring the appellants before the court depends the validity of the subsequent proceedings as to them.

In our opinion, there is nothing in the suggestion that the proceedings were directed by the statute to be had in the supreme court of the District sitting as a district court of the United States, and that such process would thereupon be sufficient as was appropriate in a district court, which would warrant the substitution of a notice of publication in the place of personal service of process. The district courts of the United States do not proceed by notice of publication instead of personal service of process, any more than do other courts, except when they act as courts of admiralty; and even then, though their proceedings are substantially *in rem*, rather than *in personam*, they can scarcely, in view of the circumstances, be regarded as exceptional. If they were, they would afford no warrant for the present proceeding; for the district court has much other jurisdiction than that of admiralty, in which notice of publication is not to be thought of for a moment as a legal substitute for personal service of process. Notice of publication in modern practice is a purely statutory device to enable the courts of justice to reach property within their jurisdiction when the parties in interest are beyond their jurisdiction and cannot be reached by personal process, the ordinary common law and inalienable right of all persons under ordinary circumstances. And when the statute authorizes such extraordinary process it is usually cumulative, dependent upon the previous issue of the ordinary process, the return of that process unserved, and allegation and proof that the party against whom it has been issued is beyond the jurisdiction of the court. But, unless we except the courts of admiralty, we know of no warrant in our system of jurisprudence for the substitution of notice by way of publication in a newspaper in the place and stead of the due process of law, beginning with personal service of notice, which is guaranteed to every individual by the common law and by our Federal Constitution.

We do not mean to say that there may not be cases in which, by the nature of an alleged public improvement, all parties, whose

property would be affected by it, would be chargeable with notice of its proposed construction, its incidents and consequences; and in which possibly a general notice by way of publication in a newspaper would be all the notice which the circumstances would reasonably allow or acquire. These are cases in which all persons interested would naturally be put upon notice. But the present is not such a case.

Here there was nothing whatever to put the appellants, or any one else, upon notice that their property would be assessed. Neither the appellants nor any other owner of property in the neighborhood could tell with any certainty that their or his property was to be assessed. There was no taxing district fixed by the statute. Whether any such taxing district could arbitrarily have been fixed, in view of the decision in Norwood *v.* Baker, we need not determine. The statute simply provided that not less than one-half of the amount to be paid for the Tuttle land required for the extension of the proposed streets should be assessed by the jury in the proceedings "against the pieces or parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets;" and from this it is very plain that no one could know, in advance of the action of the jury, what property would be declared to be benefited by the proposed extension of the streets. It is impossible even now upon the record to determine upon what theory of benefits the jury proceeded, further than they deemed themselves compelled by the statute to assess the sum of $26,000, which they found to be one-half of the value of the property taken by condemnation, upon the neighboring property, and to find sufficient property to make up that amount. But it is not apparent why they stopped in the middle of the block; and why, for instance, lot 5, in block 13, in Kalorama was assessed, and lot 6, in the same block 13, was not assessed, when the difference in benefit to the two is utterly impossible to be appreciated; or why, on the south side of the street, lot 25, in block 12, is assessed, and the immediately adjoining lot 24 is not assessed. This is not said in criticism of the jury, the members of which no doubt acted honestly upon their best judgments. But it shows very plainly the impossibility of the determination by any one, in advance of the action of the jury, that he was within the area of assessment, and therefore that he was bound by the proceedings under the general notice given by way of publication. The owners of lot 6, in block 12, and of lot 24, in block 13, and of the lots west of them, had just as much reason as their neighbors to the east of them at the time of the institution of the proceedings to suppose that they were within the scope of assessment; and the opportunity to parties to be heard in defense of their rights cannot be left to depend on any such uncertainty as is here indicated. Unless it appears very plainly from the notice of publication that the appellants were included in it, and must have known from it that they would necessarily be assessed,

we cannot see upon what principle of sound reasoning they can be held bound by that notice.

There is nothing in the statute to justify the omission of the ordinary personal notice; nor was there anything in the circumstances of the case to warrant it. If it was subsequently required by the order of ratification *nisi*, it must have been upon the ground that it was both proper and necessary. It was then had without difficulty; and there is nothing in the record to suggest that it might not have been had equally well in the first instance. Even if, when the jury had determined that the property of the appellants had been benefited and would be assessed, notice had then been given to them and they had been cited to appear and offer testimony, if any they had, and they could have been heard before the jury upon the question of assessment, it may be that they would have had the due process of law to which they were entitled. That they did not have this due process, we are compelled to hold.

From what we have said it follows, in our opinion, that there was error in the order or decree of confirmation of the award and findings of the jury in this case, and that, as against the appellants, such award and findings were not warranted by law. The order or decree appealed from will therefore be as to them reversed; and the cause will be remanded to the supreme court of the District of Columbia, with directions to vacate as to them such order or decree, and its order of confirmation *nisi*, and the award and findings of the jury; and for such other proceedings therein, if any, as may be proper according to law and not inconsistent with this opinion.

And it is so ordered.

26 WEDNESDAY, *April 25th, A. D.* 1900.

CHARLES H. DAVIDSON and A. A. WILSON and John B. Larner, Trustees, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. Beach, Commissioners of the District of Columbia.

No. 958.
April Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order or decree of the said supreme court appealed from in this cause be, and the same is hereby, reversed as to the appellants, and that this cause be, and the same is hereby, remanded to the said supreme court, with directions to vacate as to the appellants such order or decree and its order of confirmation *nisi* and the award and findings of the jury, and for

such other proceedings therein, if any, as may be proper according to law and not inconsistent with the opinion of this court.

Per MR. JUSTICE MORRIS.

April 25, 1900.

27 TUESDAY, *May 8th, A. D.* 1900.

CHARLES H. DAVIDSON and A. A. WILSON and JOHN B. Larner, Trustees, Appellants,
vs.
JOHN B. WIGHT, JOHN W. ROSS, and LANSING H. BEACH, Commissioners of the District of Columbia. } No. 958.

On motion of Mr. A. B. Duvall, for the appellees, it is ordered by the court that said appellees be, and they are hereby, allowed an appeal to the Supreme Court of the United States.

28 UNITED STATES OF AMERICA, *ss:*

To Charles H. Davidson and A. A. Wilson and John B. Larner, trustees, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 8th day of May, in the year of our Lord one thousand nine hundred.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
B. F. LEIGHTON.

29 [Endorsed:] Court of Appeals, District of Columbia. Filed May 10, 1900. Robert Willett, clerk.

30 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from one to twenty-nine, inclusive, contain a full, true, and correct copy of the transcript of record and proceedings of said Court of Appeals in the case of Charles H. Davidson and A. A. Wilson and John B. Larner, trustees, appellants, *vs.* John B. Wight, John W. Ross, and Lansing H. Beach Commissioners of the District of Columbia, No. 958, April term,

1900, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 10th day of May, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,765. District of Columbia Court of Appeals. Term No., 283. John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia, appellants, *vs.* Charles H. Davidson & A. A. Wilson & John B. Larner, trustees. Filed May 15th, 1900.